

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



# 77-2007

To be argued by  
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DANIEL WHITE,

Petitioner-Appellant,

-against-

EUGENE S. LEFEVRE, Superintendent,  
Clinton Correctional Facility,

Respondent-Appellee.

Docket No. 77-2007

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PLS

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REPLY BRIEF FOR APPELLANT

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ON APPEAL FROM AN ORDER  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



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DANIEL WHITE,

Petitioner-Appellant,

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REPLY BRIEF FOR APPELLANT

## I

Subsection (d) assumes that findings of fact evidenced by a written finding, written opinion, or other reliable and adequate written indicia are correct unless the applicant shall



establish or it otherwise appears that one of eight listed defects appears.

According to the judge himself, his only finding was with respect to the statements which the State sought to introduce into evidence, and as to those, he found that appellant was fully advised of all of his constitutional rights and that he understood these rights when they were explained to him (Tr. at 87). As indicated in appellant's main brief, the record conclusively establishes both that appellant was not advised of his right not to respond to Kopcha's questions and that the District Attorney had no intention of introducing those statements. Indeed, in the colloquy after the testimony given at the suppression hearing, the District Attorney stated:

I intend to offer ... any statement made to Detective Keenan after the defendant was advised of his rights, as well as any other statement made in the detective's presence.

(Tr. at 84).

Further, the trial judge made no further finding that the statements were made in compliance with Miranda; he found only that the statements were voluntary. Not only was the taint argument based on the failure to comply with Miranda never made to the judge, there is nothing at all in the record to support the State's argument that the judge sua sponte considered the taint theory, thereby curing the defect in counsel's representation.

Thus, since the issue of competency of counsel is a legal one and appellant is not challenging the findings of the State



court judge, §2255(d) does not apply.

If it can be said that the State judge's findings of fact mean that even the statement given to Kopcha was given after Miranda warnings, that finding is totally unsupported by the record, is a factual issue properly challenged under §2255(d) (8), and can properly be raised along with the constitutional issues of competency of counsel.

## II

In Point V of its answering brief, the State argues that there was a deliberate by-pass of the State appellate process due to the failure of the attorney who represented appellant in the Appellate Division on the direct review of the judgment of conviction to raise the issue of the trial attorney's performance at the pretrial hearing. It is true that appellate counsel did not raise any issue concerning the Huntley hearing, the admissibility of the statements, or the representation by counsel.

Appellant then unsuccessfully tried to litigate his claims by a petition pursuant to C.L.P. 440.10 in New York County and by writ of habeas corpus in Clinton County. Both applications were denied: the §440 petition for failure of jurisdiction; the habeas corpus petition for failure to raise the issues on appeal. The denial of the habeas corpus petition was affirmed



on appeal for the same reason.\*

It is clear that the Sixth Amendment constitutional issue presented by this case is cognizable on federal habeas corpus by a state prisoner under 28 U.S.C. §2254 or by a federal prisoner under §2255, even if the issue was not raised on appeal, and the failure to raise the issue on appeal is not a by-pass. Stone v. Powell, 96 S.Ct. 3037, 3043-3044 and n.10 (1976).\*\* Davis v. United States, 411 U.S. 233 (1973);\*\*\* Kaufman v. United States, 394 U.S. 217 (1969);\*\*\*\* Fay v. Noia, 372 U.S. 391 (1963); cf. United States v. Travers, 514 F.2d 1171, 1177 (2d Cir. 1974).

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\*All of these opinions were annexed by appellant to his petition. That document was not docketed with the district court, and could not be located at the time appellant's main brief was filed. It has since been located, and is the subject of a supplementary docketing.

\*\*Stone, of course, limits those Fourth Amendment claims that may be raised on federal habeas corpus, but in that respect is not relevant here.

\*\*\*Davis applies a limitation where a specific waiver rule is applicable, but there was no such rule here.

\*\*\*\*Kaufman is, perhaps, limited by Stone as to the substantive issues which can be raised, but the general rule is still applicable.



CONCLUSION

For the foregoing reasons and the reasons raised in the main brief for appellant, the order of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 28, 1977

I certify that a copy of this <sup>reply</sup> brief [REDACTED]  
has been mailed to the Attorney General of the State  
of New York.

John S. Kobayashi